Muhd Zulkifli bin Abd Ghani v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–69 OF 2010(C)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF AND ABDULL HAMID EMBONG FCJJ
14 DECEMBER 2011

Criminal Law — Dangerous drugs — Trafficking — Acquitted and discharged by High Court, Court of Appeal allowed prosecution's appeal and convicted and sentenced appellant to death — Appeal against conviction and sentence — Appellant denied knowledge of drugs found in his van — Whether Court of Appeal had seriously misdirected itself by interfering with findings of fact by trial judge

Evidence — Identification evidence — Fingerprints — Absence of fingerprint evidence on exhibits in van — Whether there was other evidence to connect appellant with drugs

The appellant and another (the co-accused) were travelling in the appellant's van on their way to Kuantan, when they were stopped by the customs raiding party. The appellant's van was searched and the two white plastic sacks found in the van contained 22,935g of cannabis. The appellant and co-accused were arrested and charged with trafficking in the cannabis found in the sacks. It was the appellant's defence that he had no knowledge of the presence of the two sacks in his van. The appellant testified that as requested he had picked up the co-accused and proceeded to a mosque, where he allegedly left his van unlocked while he went to the toilet for a few minutes. Then while proceeding on his way to Kuantan he was stopped by the customs officials and arrested. While the trial judge found there was a prima facie case made out against the appellant, he accepted the appellant's explanation as plausible based on his demeanour while giving his testimony in court. The High Court thus acquitted and discharged both the appellant and the co-accused at the end of the trial. The prosecution appealed against that decision. However, since the notice of appeal could not be served against the co-accused that appeal was struck out and the appeal proceeded only against the appellant. The Court of Appeal allowed the prosecution's appeal and sentenced the appellant to death. This was the appellant's appeal against that decision on the grounds that the Court of Appeal had misdirected itself when it interfered with the findings of fact of the High Court.

Held, dismissing the appeal:

(1) The Court of Appeal had provided several good reasons as to why it had

disagreed with the findings of fact by the trial judge. Further, the Court of Appeal was clearly aware that as an appellate court it should be slow to interfere with the findings of fact by the trial judge. In the circumstances of this case, the Court of Appeal was correct in its view that if the trial judge had taken into account factors, such as, the large size of the sacks found conspicuously in the appellant's van; the absence of any suggestion by the defence as to how the sacks came to be in the van; the fact that the appellant had stated the sacks contained 'daun' when he was questioned upon his arrest; and the material contradictions between the testimonies of the appellant and the co-accused as well as the evidence of the appellant's wife, and properly weighed these factors against the defence of mere denial he would have come to a different conclusion. There was thus no reason to interfere with the conviction imposed by the Court of Appeal (see paras 7–9, 11 & 14)

(2) This court was in agreement with the Court of Appeal's conclusions that the absence of fingerprint evidence regarding the sacks found in the van, did not affect the prosecution case in the light of the other evidence, such as the fact that only the appellant and the co-accused were in the van driven by the appellant at the relevant time and that the appellant was also the owner of the van, which connected the appellant with the drugs (see para 10).

[Bahasa Malaysia summary

Perayu dan seorang lagi (tertuduh bersama) berada dalam van perayu dalam perjalanan mereka ke Kuantan, apabila mereka ditahan oleh pihak serbuan kastam. Van perayu digeledah dan dua karung plastik berwarna putih dijumpai dalam van yang mengandungi 22,935g kanabis. Perayu dan tertuduh bersama ditangkap dan dituduh mengedar dadah kanabis yang dijumpai di dalam karung-karung tersebut. Ia adalah pembelaan perayu bahawa dia tidak mempunyai pengetahuan mengenai kedua-dua karung di dalam vannya. Perayu memberi keterangan bahawa seperti yang diminta dia telah menumpangkan tertuduh bersama dan terus ke masjid, di mana dia mendakwa meninggalkan vannya yang tidak berkunci sementara dia pergi ke tandas untuk beberapa minit. Kemudiannya apabila dalam perjalanannya ke Kuantan dia ditahan oleh pegawai-pegawai kastam dan ditangkap. Apabila, hakim perbicaraan mendapati terdapat kes *prima facie* dibuat terhadap perayu, beliau menerima penjelasan perayu sebagai munasabah berdasarkan perilakunya semasa memberi keterangan di mahkamah. Mahkamah Tinggi oleh itu membebaskan dan melepaskan kedua-dua perayu dan tertuduh bersama pada akhir perbicaraan. Pihak pendakwaan merayu terhadap keputusan tersebut. Walau bagaimanapun, memandangkan notis rayuan tidak dapat diserahkan terhadap tertuduh bersama rayuan tersebut dibatalkan dan rayuan hanya diteruskan terhadap perayu. Mahkamah Rayuan membenarkan rayuan pihak pendakwaan dan menghukum perayu dengan hukuman mati. Ini adalah

A rayuan perayu terhadap keputusan tersebut atas alasan bahawa Mahkamah Rayuan telah tersalah arah apabila ia campur tangan dengan dapatan fakta Mahkamah Tinggi.

Diputuskan, menolak rayuan:

B (1) Mahkamah Rayuan telah memberikan beberapa alasan kukuh mengapa ia menolak dapatan fakta hakim perbicaraan. Selanjutnya Mahkamah Rayuan jelas sedar bahawa sebagai mahkamah rayuan ia patut berhati-hati untuk campur tangan dengan dapatan fakta oleh hakim perbicaraan. Dalam keadaan kes ini, Mahkamah Rayuan betul dalam C pandangannya bahawa jika hakim perbicaraan telah mengambilkira faktor-faktor seperti saiz besar karung-karung yang didapati menonjol di dalam van perayu; ketiadaan apa-apa cadangan oleh pembelaan bagaimana karung-karung tersebut berada di dalam van; fakta bahawa perayu telah menyatakan karung-karung mengandungi daun semasa dia D disoal apabila dia ditangkap; dan percanggahan material di antara keterangan-keterangan perayu dan tertuduh bersama dan juga keterangan isteri perayu, dan menimbangkan secara betul faktor-faktor ini terhadap penafian semata-mata beliau akan mencapai kepada kesimpulan yang berbeza. Oleh itu tidak ada sebab untuk campur tangan E dengan sabitan yang dikenakan oleh Mahkamah Rayuan (lihat perenggan 7–9, 11 & 14)

(2) Mahkamah ini bersetuju dengan kesimpulan Mahkamah Rayuan bahawa ketiadaan keterangan cap jari berkaitan karung-karung yang F didapati dalam van, tidak menjejaskan kes pihak pendakwaan berdasarkan keterangan lain, seperti fakta bahawa hanya perayu dan tertuduh bersama berada dalam van yang dipandu oleh perayu pada masa relevan dan bahawa perayu juga adalah pemilik van tersebut, yang mengaitkan perayu dengan dadah tersebut (lihat perenggan 10).]

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Notes

For cases on fingerprints, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1979–1980.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras H 191–174.

Cases referred to

Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal [2004] 3 MLJ 405, FC (refd)

I *Lai Kim Hon & Ors v PP* [1981] 1 MLJ 84, FC (refd)

Syed Ali bin Syed Abdul Hamid & Anor v PP [1982] 1 MLJ 132, FC (refd)

Appeal from: Criminal Appeal No C-05–24 of 2003 (Court of Appeal, Kuala Lumpur)

Richard Bong Chong Fook (Hisyam Teh Poh Teik with him) (Bong & Co) for the appelant.
Awg Armadajaya bin Awg Mahmud (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Hashim Yusoff FCJ (delivering judgment of the court):

[1] The appellant together with one Eliah bin Jusoh were charged for trafficking 22,935g of cannabis. They were both acquitted and discharged at the end of the trial before the Kuantan High Court on 28 February 2003. The prosecution appealed against the said decision of the High Court. Since the notice of appeal against Eliah could not be served, that appeal was struck out, and the appeal proceeded only against the appellant. The Court of Appeal allowed the prosecution's appeal and set aside the order of acquittal and substituted it with an order of conviction and sentenced the appellant to death. Hence this appeal before us.

FACTS

[2] The facts of this case are as found at paras 4–11 in the grounds of judgment of the Court of Appeal and we do not intend to reproduce them here.

THE APPEAL

[3] Learned counsel for the appellant, in his usual candour and brevity canvassed only one main ground of appeal ie that the Court of Appeal had misdirected itself when it interfered with the findings of fact of the High Court.

[4] Reference was made to para 40 of the grounds of judgment of the Court of Appeal wherein it was said, 'Pembelaan responden, pada pendapat kami, adalah satu rekaan semata-mata dan tidak menimbulkan keraguan yang munasabah ke atas kes pendakwaan bahawa dadah tersebut berada di dalam milikan responden'.

[5] It was argued that the Court of Appeal had seriously misdirected itself in coming to the above conclusion because the defence of the appellant was that he had no knowledge of the presence of the two sacks in his van. According to the appellant's testimony, one Abang Din Haq had telephoned him while he was in his house requesting him to take or carry something and that later, one Elian would call the appellant regarding the matter.

[6] Learned counsel for the appellant submitted that Elian did call the appellant telling him that he was by the road side near Beserah, near a big tree. The appellant then went to fetch Eliah at the said place and both of them proceeded in the van to Masjid Sungai Karang. At the said mosque, it was alleged by the appellant that he had left his van unlocked while he went to the toilet for about 3-4 minutes and that thereafter when he and Eliah proceeded on their way to Kuantan, they were stopped by the customs raiding party along the road.

[7] Several reasons were given by the Court of Appeal as to why they disagreed with the findings of fact by the learned trial judge pertaining to the acquittal of the appellant. The Court of Appeal found that while the learned trial judge found there was a prima facie case made out against the appellant yet His Lordship had accepted the appellant's explanation, that he never knew about the presence of the two sacks of cannabis found in his van, as plausible, based on his demeanour while giving his testimony in court. The Court of Appeal disagreed with this finding by the learned trial judge because it found that the two white plastic sacks which were found in the van as can be seen in the photo exhs P5 5–13 were large in size and could not have been missed by anyone as they were not covered or hidden from sight. The Court of Appeal also found that while being cross-examined, the appellant said he left the van to go to the toilet for 2–3 minute only and there was no obstruction between the van and the toilet In view of their big size, the Court of Appeal found that it was impossible that anybody could have placed the two sacks in the van during the very short space of time. There was no suggestion by the defence as to who else could have put the two sacks in the van.

[8] The Court of Appeal also found that the appellant's testimony that he had left the van unlocked with its ignition key in the van to be highly suspect. More so when the appellant's wife herself had testified that the appellant had told her that he was going out to attend a *kenduri* function while during the trial he said that he had gone out that night in order to take something which one Din Haq had requested him to do. The Court of Appeal found on this point that the appellant had deliberately lied to his own wife. This, the Court of Appeal concluded, showed that the appellant knew about his unlawful act which he was planning to do. The Court of Appeal cited the observation of Salleh Abas FJ (as he then was) in *Syed Ali bin Syed Abdul Hamid & Anor v Public Prosecutor* [1982] 1 MLJ 132 at p 135 as follows:

> In other jurisdictions a false statement made by an accused person concerning the surrounding circumstances in which an offence was committed whilst he had an opportunity to commit the offence can be regarded as a corroboration of the evidence against him. *Eade v The King and also Regina v Lucas (Ruth)*. We accept the decisions in these cases to be good law. In this case we hold that the representation he made to PW4 regarding the purpose of borrowing the car was a deliberate lie and

is therefore a corroborative evidence against him for which he must explain. Such lie is a reflection of his consciousness of guilt as regards the use he intended to make of the car in question.

[9] The Court of Appeal also found that the material contradiction between the testimony of the second accused, Eliah and the appellant had affected the credibility of the appellant. Contrary to what the appellant had testified, Eliah instead said that he was already at the Sg Karang mosque when he got acquainted with the appellant and later got a lift in his van to go to Kuantan. Eliah testified that he did not know the Appellant before they met in the said mosque. We agree with the Court of Appeal that this material contradiction does not support the appellant's evidence that he had received a call from Eliah and later went to pick him up by the road side near Beserah and that they went together in the van to the Sg Karang mosque. It would therefore not be wrong for the Court of Appeal to say that this material contradiction had affected the appellant's credibility as a witness. There is no evidence to suggest why Eliah did not support the testimony of the appellant.

[10] The Court of Appeal also concluded that the absence of the fingerprint evidence regarding the exhibits found in the van did not affect the prosecution case as there was ample other evidence to show that only the appellant and Eliah were found in the van driven by the appellant at the relevant time and that the appellant was also the owner of the said van. We agree with the Court of Appeal, as there is no statutory provision requiring the prosecution to produce any fingerprint report especially when there is enough other evidence to connect the appellant with the drugs.

[11] The Court of Appeal was clearly aware that it is trite law that an appellate court should be slow to interfere with the findings of fact by the trial judge. Reference was made by the Court of Appeal to the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405 wherein Abdul Hamid Mohammad FCJ (as he then was) quoted a passage in the case of *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84: '… The principle of law governing appeals in criminal cases on questions of fact is well established, in that the appeal court will not interfere unless the balance of evidence is grossly against the conviction especially upon a finding of a specific fact involving the evaluation of the evidence a witness founded on the credibility of such witness.'

[12] The learned DPP in his submission before us stressed on the point that upon being questioned by the customs arresting officer (SP3) as to the contents of the two sacks, the appellant himself had said it was 'daun'. This fact clearly shows that the appellant was aware of the nature of the contents of the two

A sacks. There was no mention by the appellant at that material time that he was not aware of the two sacks found conspicuously in his van.

[13] We also agree with the Court of Appeal that if the learned trial judge had taken into account the factors mentioned earlier, and properly weighed the B defence of mere denial with that of the prosecution evidence, he would have come to a different conclusion. We find that the Court of Appeal had correctly interfered with the findings of facts made by the trial judge as the balance of evidence is grossly against the acquittal of the appellant. There was no misdirection by the Court of Appeal.

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[14] We see no reason to interfere with the conviction imposed by the Court of Appeal. This appeal is therefore dismissed. The conviction and sentence on the appellant are affirmed.

D *Appeal dismissed.*

Reported by Kohila Nesan

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